Supreme Court, U.S.
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No. 94-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioners,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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32 pp

QUESTIONS PRESENTED

I. Must a court of appeals consider the entire record when determining whether the trial court's findings are clearly erroneous, or may the appellate court instead forego review when the lower court's findings are supported by the testimony of the prevailing party's expert witness?

II. Does the requirement in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), that a plaintiff in a disparate-impact case under Title VII of the Civil Rights Act of 1964 identify the practice causing the disparate impact impose such a heavy burden that plaintiffs who have made the greatest showing possible nonetheless fail to meet the burden?

III. May otherwise proper statistical proof of racial disparities in hiring, promotions, and upgrades be overcome by speculation unsupported in the record, by unsupported presumptions of prior discrimination against whites, by the employer's manipulation of inappropriate standards of availability of blacks for the positions in question, and by the employer's carving of the statistical analysis into chunks of data so small that it becomes difficult for a test of statistical significance to be able to rule out chance as the cause of the observed disparities even if intentional discrimination had occurred?

Petitioners:

Daniel Anderson, Jr.
Poitier Anderson
Mose Emanuel Bailey
Moses Coleman
Linda Diane Sharp Davis
Richard Grant, Jr.
Earnest Hall
Tommy Hardy
Chris Spring Harris
Synovia Ann Jackson
Lonnie Darril Jennings
James Henry Lewis
Robert Melvin
Micheal Chiffon O'Neal
Bobbie Jean Sharp
Alexander Smith
Catherine Spells
Gregory Townsend
Kimroy Williams

and the classes they represent, which were certified and defined in the Order of January 30, 1987 and in the Opinion of August 12, 1988. The Order of January 30, 1987, certified and defined the classes as follows:

> On the count arising under 42 U.S.C. § 1981, the class shall consist of (1) all present and former black employees of the defendant Douglas & Lomason Company at its Cleveland, Mississippi, plant who have been employed by the defendant at any time since October 1, 1982, but excluding any black employees currently employed in office clerical or supervisory positions, and (2) all black individuals who have completed and submitted applications for employment at this plant since October 1, 1982, and were denied employment. On the count arising under Title VII of the Civil

> Rights Act of 1964, as amended, (1) all present and former black employees of the defendant Douglas & Lomason Company at its Cleveland, Mississippi, plant who have been employed by the defendant at any time on or after April 20, 1984, but excluding any black employees currently employed in office clerical or supervisory positions, and (2) all black individuals who have completed and submitted applications for employment at this plant on or after April 20, 1984.

The Opinion of August 12, 1988 additionally certified and defined the following subclasses:

> (a) On the count arising under 42 U.S.C. § 1981, a class of all black persons who have, at any time between October 1, 1982 and January 17, 1985, unsuccessfully sought to obtain application forms for employment with Douglas & Lomason, either directly or through persons then employed by the company, whether or not such members of the subclass have received an application form at any other time inside or outside the period; and
>
> (b) On the count arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., as amended, a class all black persons who have, at any time between April 20, 1984 and January 17, 1985, unsuccessfully sought to obtain application forms for employment with Douglas & Lomason, either directly or through persons then employed by the company, whether or not such members of the subclass have received an application form at any other time inside or outside this period.

Respondents:

Douglas & Lomason Co., Inc.

Aluminum, Brick & Glass Workers International Union (Rule 19, F.R.Civ.P., defendant below)

Local Union No. 212 of the Aluminum, Brick & Glass Workers International Union (Rule 19, F.R.Civ.P., defendant below)

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Statutes Involved 2

Statement of the Case 4

Reasons for Granting the Writ 18

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE PRIOR DECISIONS OF THIS COURT AS TO WHETHER A COURT OF APPEALS MUST CONSIDER THE ENTIRE RECORD WHEN DETERMINING WHETHER THE TRIAL COURT'S FINDINGS ARE CLEARLY ERRONEOUS, OR MAY INSTEAD FOREGO REVIEW WHEN THE LOWER COURT'S FINDINGS ARE SUPPORTED BY THE TESTIMONY OF THE PREVAILING PARTY'S EXPERT WITNESS 18

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINION IN *WARDS COVE PACKING CO. v. ATONIO*, ON THE DEGREE OF THE BURDEN REQUIRED TO IDENTIFY THE EMPLOYMENT PRACTICE CAUSING THE DISPARATE IMPACT 20

III. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINIONS, ON THE PROPER EVALUATION OF STATISTICAL EVIDENCE AND ON THE IRRELEVANCE OF SPECULATION 22

Conclusion 23

TABLE OF AUTHORITIES

1. Cases

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 19

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 18

Bazemore v. Friday,
478 US 385 (1986) 19

Dayton Bd. of Educ. v. Brinkman,
443 U.S. 526 (1979) 20

Dothard v. Rawlinson,
433 U.S. 321 (1977) 22

Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee, 833 F.2d 1334 (9th Cir. 1987), *cert. den.,* 487 U.S. 1210 (1988) 22

Ezell v. Mobile Housing Board,
709 F.2d 1376 (11th Cir. 1983) 22

EEOC v. American National Bank,
652 F.2d 1176 (4th Cir. 1981),
cert. den., 459 U.S. 923 (1982) 22

Graver Tank & Mfg. Co. v. Linde Air Products Co.,
336 U.S. 271 (1949) 19

Green v. USX Corp.,
896 F.2d 801 (3rd Cir.),
cert. denied, 498 U.S. 814 (1990) 21

Int'l Bhd. of Teamsters v. United States,
431 U.S. 324 (1977) 22

Lewis v. Bloomsburg Mills,
773 F.2d 561 (4th Cir. 1985) 20

Lilly v. Harris-Teeter Supermarket,
720 F.2d 326 (4th Cir. 1983),
cert. den., 466 U.S. 951 (1984) 22

Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 621 (1974) 22

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 18

United States v. United States Gypsum Co.,
333 U.S. 364 (1948) 18

Wards Cove Packing Co. v. Atonio,
490 U.S. 642 (1989) 20, 21, 22

2. Statutes and Court Rules

§ 703(a) of the Civil Rights Act of 1964,
42 U.S.C. § 2000e-2(a) 2, 3

§ 704(a) of the Civil Rights Act of 1964,
42 U.S.C. § 2000e-3(a) 2, 3

42 U.S.C. § 1981 . . . . . 2, 4

Title VII of the Civil Rights Act of 1964,
42 U.S.C. §§ 2000e *et seq.* . . . . . *passim*

Rule 52(a), F.R.Civ.P. 18

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1994

DANIEL ANDERSON, JR., *et al.*,

Petitioner,

v.

DOUGLAS & LOMASON CO., INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners Daniel Anderson, Jr., *et al.*, respectfully pray that this Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals entered on June 23, 1994, corrected on July 28, 1994, and revised on September 9, 1994.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Daniel Anderson, Jr., et al. v. Douglas & Lomason Co., Inc., et al.*, 26 F.3d 1277 (5th Cir. 1994). The corrected decision of the Court of

Appeals issued on July 28, 1994 is set forth at App. 1a. The original decision of the Court of Appeals issued on June 23, 1994 is set forth at App. 82a. The findings of fact and conclusions of law entered by the district court on July 21, 1992 have not been officially reported, and are set forth at 164a. The judgment of the district court is set forth at 287a. The letters of determination issued by the United States Equal Employment Opportunity Commission to the petitioners are set forth at 289a.[1] The Order of the Court of Appeals denying petitioners' petitions for panel rehearing and rehearing *en banc,* and revising the July 28, 1994 corrected opinion of the Court of Appeals, is set forth at App. 319a.

JURISDICTION

The Court of Appeals denied petitioners' petition for rehearing on September 9, 1994. This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c), and Rule 13.4 of the Rules of this Court.

STATUTES INVOLVED

This case involves §§ 703(a) and 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a) and -3(a), and 42 U.S.C. § 1981. These sections provide as follows:

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[1] The letter of determination for Thomas Hardy is not contained in the Joint Exhibit which is supposed to contain it, and is therefore not included in the Appendix. It does not differ in any significant respect from those which are contained in the Appendix.

Sec. 703(a). Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer——

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Sec. 704(a). Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, ... because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. § 1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

STATEMENT OF THE CASE

Petitioners were at the time the Complaint was filed unsuccessful black applicants for employment, and present and former black employees, at the Douglas & Lomason Co. plant in Cleveland, Mississippi. They filed their EEOC charges on October 17, 1984 and later, and filed this class action against the respondent company on July 5, 1985. The local and international union respondents were later added as Rule 19, F.R.Civ.P., defendants.

The respondent company manufactured automotive trim as a supplier for automobile manufacturers at a plant in Cleveland, Mississippi, in the heart of the Delta. Petitioners' hiring claims involve the unskilled entry-level "production" or "general factory" job category at the plant; applicants "need only meet certain minimal requirements, such as being at least eighteen years of age, physically able to perform the work, and able to read and write." 2a, 13a. Numerous whites were hired without any factory experience. PX-152. The various functions in the job category were unskilled and very simple. The only training for new hires is what they picked up by doing the job. Tr. 59-67.

Petitioners raised two class claims of hiring discrimination for this unskilled production job. *First,* petitioners complained that the company's restrictions on access to application forms between April 13, 1983 and January 14, 1985, disproportionately prevented blacks from obtaining application forms at times when the company was hiring, and thus prevented them from applying and being considered for hire. Pretrial Order at 8, R. 2585. This was both a disparate-impact claim and a disparate-treatment claim.[2] *Second,* petitioners complained of discrimination against those black applicants who managed to obtain application forms, from October 1, 1982 through 1985. Pretrial Order at 8, R. 2585. All of petitioners' claims of discrimination are focused on the period beginning October 1, 1982, when a new Plant Manager, James Grizzard, arrived, and generally end either at the end of 1985 (hiring) or when suit was filed (promotions and upgrades).[3]

While the respondent company disputed the relevance of petitioners' expert evidence, it did not dispute the statistical accuracy of this evidence. Both sides agreed that the period from January 1, 1978 to September 30, 1982 was the relevant timeframe for

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[2] Petitioners have never complained that applicants had to fill out application forms at the plant, contrary to the opinion below at 2a-3a and 9a, but complained that would-be applicants were not allowed to fill out application forms even when the company was hiring, a practice the panel regarded as common. App. at 11a-12a. The panel did not address the actual disparate-impact claim. Dissent, App. at 54a-57a and 71a.

[3] Petitioners also complained of racial discrimination in promotions to Leader and Foreman positions in production, in temporary upgrades to two Maintenance positions, in the filling of a permanent Rack Maintenance position, and of retaliation in enforcing the company's anti-garnishment rule.

historical analysis, but there was virtually no hiring between late 1980 and September 30, 1982. Both sides agreed, for example, that in the 1980 Census blacks were 51.9% of the civilian labor force, 58.2% of the manufacturing labor force, and 60.7% of the blue-collar workforce. DX-127. Blacks were 70.1% of employed operators, laborers, and fabricators in Bolivar County, excluding the respondent's employees. PX-62-A. There was likewise no dispute that 65.0% of the most work-interested job-seekers at the Mississippi State Employment Service were black. PX-56, 62-A; dissent below at 62a n.8 and 64a-66a. In point of fact, there was no dispute that every measure external to the company showed that blacks were the majority of those available for unskilled, entry-level factory work. The court of appeals refused to consider any of this evidence, stating:

> Because we agree with the district court that actual applicant flow was the best measure of D & L's performance, we need not address whether the district court erred in failing to follow the seven standards offered by the plaintiffs to define the labor pool available to D & L. The district court rejected each standard as being flawed.

App. at 15a n.14. The lower court also admitted that it did not consider the process of determining whether a trial court's findings were "clearly erroneous" to require the examination of any finding supported by expert testimony, even where the appellants had presented extensive expert analysis of their own:

> The district court found Dr. Haworth's analysis to be more credible and more persuasive than the seven analyses offered by the plaintiffs' expert. "We do not have

> the statistical expertise to declare a particular statistical technique inappropriate where a qualified expert expresses a contrary view and the district court credits the testimony." *Id.; see also Trevino,* 811 F.2d at 904 (holding that the district court did not err in crediting the defendant's statistical evidence over contrary evidence); *Nash,* 800 F.2d at 497 (noting that we must affirm the district court's finding where there are two permissible views of the evidence). Thus, we find that the district court did not err in crediting D & L's statistical analysis, which demonstrated that D & L did not engage in discriminatory hiring practices, over the analyses offered by the plaintiffs.

App. at 19a (footnote omitted). In response to petitioners' petition below for panel rehearing and suggestion for rehearing *en banc,* the panel struck part of the language admitting that it had upheld the trial court's findings without considering the bulk of plaintiffs' proof. App. at 319a. The panel did not go back and consider any of the evidence it had ignored, and did not strike all of the language stating that appellate courts should not review findings supported by the winning side's expert testimony considered in isolation from all other evidence.

Both sides agreed that the proportion of the company's employees who were black as of any given date was higher than their availability, because whites hired into these jobs left voluntarily much more frequently than blacks, and white employees were involuntarily terminated much more frequently than blacks. DX-138, PX-195. The court of appeals treated this neutral fact as evidence of non-discrimination in hiring, App. 13a-14a, although a high proportion of the workforce in the years at issue

were simply holdovers from earlier hiring--90% in 1982, 75% in 1983, 60% in 1984, and 58% in 1985--and although the representation of blacks went down over the years in question.

Both sides agreed that blacks were 64.6% of the hires from January 1978 through 1980, and 46.5% of the hires from Oct. 1, 1982 through 1985. The company offered no non-racial explanation for the disparity, other than to suggest that it might be explained by Personnel Manager Haynes' refusal to provide application forms to all persons seeking jobs at times when the company was hiring. The trial court found that this was in fact a reason for the disparity and admitted that petitioners could not possibly have made a more specific showing, App. at 179a-180a, but held that this Court's decision in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), required a more specific showing as a condition of mounting a disparate-impact challenge to an employment practice. App. at 270a-276a. The court of appeals agreed, App. at 8a-9a, but the dissent disagreed. App. at 53a-57a.

The majority below held correctly that Personnel Manager Haynes limited the number of applications she took when the company was hiring, because she only wanted to consider a limited number of people. "Thus, it was possible for individuals to be told that D&L was not taking applications both when the Company was and was not hiring." App. at 3a-4a. As the dissent pointed out, petitioners established that more than 50 black job-seekers had been denied applications at times when the company was hiring, and the company was not able to identify a single white job-seeker denied an application at a time when the company was hiring. App. at 55a-57a. Many of these attempted applicants testified at trial or by deposition, and pinned down the periods of time when this occurred by taking the names of relatives and friends

of either race who had told the witnesses they had been hired, leading the witnesses to try to apply, and looking up the hire dates of those relatives and friends on a list of hires petitioners had obtained in discovery.[4] Some of these witnesses saw whites obtaining applications and being hired at the same time blacks were being turned away. App. at 56a. Many of these witnesses tried again and again to get applications, but never hit the fortuitous, precisely right time to get an application, and became discouraged. The panel majority approved the trial court's rejection of this voluminous testimony on the ground that the witnesses were discredited, in that other blacks had managed to obtain applications, the company had provided a legitimate, nondiscriminatory reason for its refusal to make applications available, and plaintiffs had failed to produce a smoking gun showing that race was the true reason for the inability of these attempted applicants to get application forms. App. at 41a-42a.

The court of appeals then upheld the trial court's decision that the true measure of black availability for these unskilled, entry-level jobs was the racial composition of the persons who got application forms between April 1984 and January 1985, while refusing to consider peti-

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[4] As the dissent points out, the company did not object to the admission of this evidence for the purpose of pinning down the periods of time when the witnesses were trying to obtain application forms. The trial court regarded it as sinister, and as undermining the credibility of the black attempted applicants who testified in person or by deposition, that each of these witnesses called by plaintiffs could pin down at least one unsuccessful effort to obtain an application to a time when the company was hiring. App. at 218a-219a. There would, of course, have been no professionally legitimate purpose in proffering the testimony of others who could not pin down the timing of their efforts in some credible fashion. A rule that the relevance of testimony is alone enough to make it suspect is unknown outside the field of civil rights litigation.

tioners' evidence to the contrary. App. at 15a-16a. Dr. Haworth, the company's expert, variously calculated this figure as 45.5% black or 46.7% black. DX-123 through DX-126. These figures are substantially below all external measures of the availability of blacks, and Dr. Haworth agreed that her figures assume blacks in this part of the Mississippi Delta are *less* available for jobs at the *bottom* of the job ladder than they are for jobs at the *top,* a situation which is the reverse of what both sides' experts testified is actually the case: that civilian labor-force statistics not differentiating among kinds of jobs will underestimate the availability of blacks for low-end jobs like the job at issue here and overestimate the availability of blacks for high-end jobs. Tr. 1886-87 (Dr. Haworth); Tr. 2029-30 (Dr. Mann). The dissent below explained in detail why Dr. Haworth's figures were "out of touch" with reality. App. at 70a-71a n.20.

Two additional problems in the use of such applicant-flow statistics deserve mention. *First,* petitioners introduced substantial evidence that the application forms were not complete for the period of time from April 1984 through the notice of the EEOC charges on October 17, 1984. Personnel Manager Haynes told a markedly different story every time she was under oath. In her March 9, 1987 deposition, she testified that she kept applications for a year if the applicant was aged 55 or older, and that she had been specifically instructed to keep for six months the applications of persons under age 55. (PX-90, Dep.Tr. 17). At the trial, she testified oddly that all applications were good for a year but she did not keep any of them for more than six months. (Tr. 466-67, R.Vol. 17). When she was confronted, she stated "I really don't know other than I just don't remember keeping any applications longer tha[n] six months, of anyone." (Tr. 467-68, *id.*). In 1987, she had also testified that she was not sure which applications she had retained, and that she

may have thrown out some applications before October 1984. (PX-90, Dep.Tr. 25). She was clear that she made a deliberate effort to keep application forms after mid-October 1984 when she received notice of classwide EEOC charges, and that until this time she had routinely discarded applications, but not about anything else. Tr. 514-15, R.Vol. 17. The defendant's expert testified grudgingly at trial, after being confronted with her own deposition testimony given the preceding month, that Ms. Haynes had told her that during some period of time Ms. Haynes kept the applications Ms. Haynes thought were worth future consideration and threw away the others. Tr. 1905-06, R.Vol. 22. Plaintiffs introduced uncontradicted statistical evidence tending to confirm this and to show that the applications of blacks between April and mid-October were disproportionately thrown away. The trial court had found that Ms. Haynes consistently took 12-15 applications to fill 7 positions. App. at 168a. This is consistent with data for the surviving application forms for the period from October 17, 1984 through January 1985: 39% of the surviving forms are for persons never hired. It is *not* consistent with undisputed data for the surviving application forms for the period from April 1984 through October 16, 1984: only 22.4% of the surviving application forms were filed by person who were not hired. PX-190. This suggests that a substantial number of forms were discarded.[5] There is also a huge racial

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[5] The company had no explanation at trial, but after the trial suggested that an applicant could have applied in the first period and been hired in the second period. It provided no data or revised calculation. Petitioners then gave the trial court the results of a re-calculation from the evidence of record in which applicants were counted as hires in the same period as that in which

(continued...)

difference in the composition of the surviving applications between the two periods. Of the applications surviving from April 1984 through October 16, 1984, it is undisputed that only 37.6% were filed by blacks, and it is undisputed that for the applications filed between October 17, 1984 and January 1985, 60.4% were filed by blacks.[6] PX-189. The latter figure is lower than most of the external measures of the availability of blacks for these jobs, but the district court stated that the percentage of applications filed by blacks was higher in October 1984 because:

> ... it was during this period of time that the activity spearheaded by Oliver Robinson to enlist other black residents of the community to sign and file EEOC charges was well underway, and may very well have had an impact upon the variance and percentage of black applicants in that applicant pool, as

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[5](...continued)
they applied. It showed an even larger disparity: from April 1984 to October 16, 1984, 22.4% of the surviving application forms were filed by unhired applicants; from October 17, 1984 through January 1985, 44.1% were filed by unhired applicants. The district court ignored this information, and speculated -- directly contrary to this evidence -- that the shortage of unhired applicants before October 1984 was because they were hired later. Opinion at 65, R.E. 87.

[6] The company suggested in its post-trial submission that PX-189 was incorrect for the same reason as PX-190. Plaintiffs then gave the district court the results of a re-calculation similar to that described in the preceding note. It showed virtually identical results: from April 1984 to October 16, 1984, 37.6% of the surviving application forms were filed by blacks; in the period from October 17, 1984 through January 1985, 60.2% were filed by blacks.

compared with pools before and after it.

App. at 175a. There is no evidence in the record that Mr. Robinson[7] ever urged anyone to apply for a job with the company, or that any filing of EEOC charges by anyone ever led anyone to file or file an application. There is no such testimony in any of the many depositions taken in this case, and no such evidence was adduced at trial. Notwithstanding the trial court's undeniably speculative locution -- "may very well have had" -- the court of appeals stated that the trial court had made an actual finding to this effect, and upheld it as not clearly erroneous. App. at 17a; dissent at 61a-62a.

Petitioners' statistician, Dr. Mann, concluded as a statistical matter that the surviving applications for the period from April 1, 1984 through October 16, 1984 came from a "different population" than the surviving applications for the period from October 17, 1984 through January 1985. The differences are too large for these sets to be coming from the same population. Such differences could be seen by chance only a few times in a thousand cases. Tr. 2032-33, R.Vol. 18. Again, the company did not dispute this evidence.

Second, laying aside the question of what Dr. Haworth had to work with by way of retained applications, there are enormous question about what she *did*

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[7] The record shows that Mr. Robinson had been diagnosed by his therapist as suffering from paranoid schizophrenia, that this condition did not interfere with the high quality of his work as a Quality Control Inspector with the company, that after he was assaulted within the plant by a white supervisor, Tom Garner, he was unable to continue working, and that the company gave Mr. Garner a one-week paid suspension and required him to use a week of vacation so that he would be gone for another week.

with what she had. She made numerous changes to the data, excluding from her analysis groups of applications which were predominantly black, including in her analysis an application filed by a white for a *different* job, and excluding predominantly-black applicants in October and November 1984. Dissent, App. at 60a n.7. In addition, Dr. Haworth admitted on cross-examination that she divided applicants into "pools" and counted some applicants -- disproportionately white -- in two pools rather than one; she excluded applicants who were disproportionately black from some pools; and she excluded applicants who had been referred by MSES in 1985 although she included the hires made from those referrals, with the effect that the percentage of applicants who were black was decreased and the percentage of hires who were black was increased. Tr. 1831-57. Removing these thumbs from the scale increases black availability to 54.4% of the applicants allowed to fill out forms. PX-188-A.

The trial court ignored these problems and accepted Dr. Haworth's analysis as the best measure of the availability of blacks for unskilled, entry-level factory work. App. at 173a-174a, 278a. The majority below affirmed, without considering petitioners' alternative analyses. App. at 15a-20a.

Dr. Haworth then divided the company's hiring into segments, applied her availability figure to the company's hiring in each separate segment and concluded there was no hiring discrimination unless she found a statistically significant shortfall for that segment standing alone. In virtually all segments, the company hired fewer blacks than even her standard would suggest. Even with her very low standard of black availability, she found a statistically significant shortfall in the hiring of blacks (3.89 standard deviations). DX-119.

The experts for both sides agreed that, as sample sizes decrease, it is more difficult for a test of statistical significance to detect a non-random difference in hiring rates. The sample sizes in each hiring segment on DX-119 were small -- 14, 27, 32, 38, 51 and 27 hires -- and only the October 8-November 2, 1984 segment (with the largest sample size) produced a finding of statistically significant results when examined in isolation from the larger picture. Dr. Haworth then discarded this finding, excluded the applicants for the October-November period from her analysis, and found that there was no statistically significant shortfall. *Id.* She claimed that she had excluded them because these applicants disproportionately had manufacturing experience or blue-collar experience, but never compared them with applicants from other periods of time to see if there was a non-random difference, and then admitted on cross-examination that she did not know the experience of these applicants, but had merely made assumptions based on the names of their employers. Tr. 1744, 1963-64. The panel majority approved the explanation Dr. Haworth gave on direct examination, without ever addressing what she admitted on cross-examination. App. at 16a-17a n.15. *And see* the dissent, App. at 60a-62a n.7. On DX-123 and DX-125, she used even smaller hiring segments, with sample sizes as low as 5 hires.

From May 31, 1985 to September 20, 1985, the last period of hiring challenged by petitioners, the company considered for hiring only the applicants who were referred by the Mississippi State Employment Service. The company hired 84.4% of white applicants referred by MSES, compared with 50.8% of black applicants so referred. PX-46-A. This difference was statistically significant (2.7 standard deviations). Three of the six MSES job orders in 1985 involved "OJT" referrals -- persons who were supposedly harder to place and whose

wages if hired were subsidized by the government. The experts for both sides admitted that the OJT referrals here were hard to distinguish from regular referrals, including persons with manufacturing experience, some college education, supervisory experience, and craft experience. Tr. 1870-77, 2004. Even when broken down by type of referral, however, the racial disparities remained. The company hired 90% of regular white referrals from MSES, compared to 26.3% of regular black referrals, and hired 83.3% of white OJT referrals, compared with 61.9% of black OJT referrals. Dr. Haworth segmented the MSES hiring into six units, one for each job order. One job order still involved a statistically significant racial disparity, so she discarded it. Her exhibit admitted that the company's hiring on all the regular job orders showed a statistically significant racial disparity, and this remained even when she discarded the job order mentioned above.[8] DX-122-A. The district court approved Dr. Haworth's analysis of the company's hiring from 1985 MSES referrals and found no discrimination. App. at 186a. The panel majority affirmed. App. at 20a-21a.

Promotions to leaders and foremen are virtually all made from within the company's own workforce, there are no objective qualifications for these positions, and there is no evidence in the record showing that there is any racial difference in the ability of production workers to meet the subjective qualifications. Nevertheless, the district court approved Dr. Haworth's use of an external measure of availability: the 19.1% representation of blacks among supervisors of precision production workers, *i.e.*,

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[8] In one of Dr. Haworth's segmented hiring analyses, she included hires from the MSES job orders but applied her very low standard of availability to these hires, without including the applicants referred by MSES in her "applicant flow". DX-123.

craft workers. App. at 222a-224a. The court of appeals affirmed this finding, stating that the company's supervisors were included among the supervisors of precision production workers. App. at 26a n.24. The undisputed evidence is to the contrary: Dr. Haworth testified on cross-examination that only the company's Maintenance Department supervisors were included in this figure, Tr. 1941-43, and these supervisory jobs are not included in petitioners' claim of discrimination. The dissent found the district court's and majority's analysis "greatly misleading". App. at 71a-77a.

Although the district court and the panel majority were extremely quick to find rationalizations for discounting and finding worthless every statistical disparity showing that blacks were disfavored, when petitioners pointed out that the hiring, promotions, and temporary upgrades of blacks was far more substantial during the concededly relevant period from January 1, 1978 to the arrival of Mr. Grizzard than they were during the Grizzard years, both the district court and the panel majority were quick to speculate -- in the absence of any evidence whatsoever -- that there was racial discrimination *against whites* in the pre-Grizzard years. *See* App. at 24a as to promotions ("the bias in favor of blacks during the pre-Grizzard period"); App. at 179a ("Plaintiffs' analysis in this case fails to take into account the distinct possibility that the hiring rate prior to the period beginning October, 1982, may indeed have been discriminatory in favor of black applicants."); 233a ("in the pre-Grizzard period blacks were given more favorable treatment -- the system was not neutral"); *and see* the dissent below at 77a n.29.

The district court's and Court of Appeals' views of all claims were strongly affected by their conclusion that there was no pattern of racial discrimination against blacks.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT BETWEEN THE FIFTH CIRCUIT AND THE PRIOR DECISIONS OF THIS COURT AS TO WHETHER A COURT OF APPEALS MUST CONSIDER THE ENTIRE RECORD WHEN DETERMINING WHETHER THE TRIAL COURT'S FINDINGS ARE CLEARLY ERRONEOUS, OR MAY INSTEAD FOREGO REVIEW WHEN THE LOWER COURT'S FINDINGS ARE SUPPORTED BY THE TESTIMONY OF THE PREVAILING PARTY'S EXPERT WITNESS

Time and again, this Court has emphasized that an appellate court examining a trial court's findings under Rule 52(a), F.R.Civ.P., must examine the entire record.

United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948), held that:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Accord, Anderson v. City of Bessemer City, 470 U.S. 564, 573-74 (1985).

It makes no difference that the findings the Court of Appeals declined to review, and the evidence it declined to consider (the bulk of petitioners' evidence), involved expert testimony. In *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982), this Court held that Rule 52(a)

"does not make exceptions or purport to exclude certain categories of factual findings". *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 274-75 (1949), held that the "clearly erroneous" test of Rule 52(a) applies to expert testimony.

This Court has previously confronted the same situation. *Bazemore v. Friday*, 478 US 385, 397-98 (1986), unanimously held that the district court had erred in its "refusal to accept the petitioners' expert statistical evidence as proof of discrimination by a preponderance of the evidence." There, both lower courts had rejected petitioners' multiple regression analyses because they partially reflected the effects of pre-Act discrimination and because they did not include all measurable variables. The court of appeals held that this evidence was "unacceptable as evidence of discrimination", a view which this Court held was "plainly incorrect." Normally, omissions may affect the probative value of evidence, but not its admissibility. The Court stated:

> A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.

478 U.S. at 400. The Court continued at 401:

> In this case the Court of Appeals failed utterly to examine the regression analyses in light of all the evidence in the record.

Similarly, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425-36 (1975), involved an intense review of conflicting expert testimony with respect to the validity of employ-

ment tests.

This Court made clear in *Dayton Bd. of Educ. v. Brinkman,* 443 U.S. 526, 534 n.8 (1979), that a court of appeals has the "unavoidable duty" to "determine whether the trial court's findings are clearly erroneous, sustain them if they are not, but set them aside if they are." A district court may not ignore the evidence, or pay attention only to one party's submissions. *Lewis v. Bloomsburg Mills,* 773 F.2d 561, 570 (4th Cir. 1985). When an appellate panel does so, the entire purpose of review is defeated. The orderly administration of justice requires no less. A rule immunizing from further review the statements of the first expert to be accepted by the trial court would wreak havoc.

No proposition is more central to the concept of appellate review than the concept that the entire record must be examined. The holding of the court of appeals that it need not consider petitioners' expert evidence because of the deference it believed must be paid to findings supported by the winning side's expert makes such review illusory.

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINION IN *WARDS COVE PACKING CO. v. ATONIO,* ON THE DEGREE OF THE BURDEN REQUIRED TO IDENTIFY THE EMPLOYMENT PRACTICE CAUSING THE DISPARATE IMPACT

In *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642, 656-58 (1989), the Court held that plaintiffs in a Title VII disparate-impact case are required to identify the specific employment practice which caused the disparate impact.

Here, petitioners showed a large drop in the hiring of blacks, which both lower courts attributed to the company's decision not to provide application forms to persons seeking to apply at times when the company is hiring. It is literally impossible for a Title VII plaintiff to make any further showing in such a situation. The holding below that such a showing is not enough to identify the practice causing the disparate impact conflicts with *Wards Cove* itself. Nothing in *Wards Cove* suggests that this Court was demanding of Title VII plaintiffs a burden impossible to carry; the Court expressly noted that the causation requirement would not be "unduly burdensome" to meet. 490 U.S. at 657-58.

Green v. USX Corp., 896 F.2d 801, 805 (3rd Cir.), *cert. denied*, 498 U.S. 814 (1990), held that the disparate impact of a subjective interviewing system was established by proof that the percentage of successful black interviewees was significantly less than the overall percentage of successful interviewees. Here, the panel majority held that proof that black hiring rates tumbled after Personnel Manager Haynes started restricting access to application forms, which it attributed to the effect of the changes in themselves, was not sufficient. The dissent correctly stated that this was error. App. at 66a, 71a.

Resolution of this question is important. Facially neutral employment practices can cause barriers to the employment and advancement of members of minority groups and of women which are every bit as exclusionary as the most rigorous forms of intentional discrimination. If Title VII plaintiffs are held to impossibly difficult burdens in identifying the practices causing the disparate impact, these barriers will go unchallenged and the intent of Congress in enacting Title VII will in part have been defeated.

III. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS, AND THE CONFLICT WITH THIS COURT'S OPINIONS, ON THE PROPER EVALUATION OF STATISTICAL EVIDENCE AND ON THE IRRELEVANCE OF SPECULATION

In a plethora of decisions, this Court has attempted to chart a path for the lower courts to follow in the evaluation of statistical evidence in Title VII cases. *Wards Cove, supra; Dothard v. Rawlinson,* 433 U.S. 321 (1977); *Int'l Bhd. of Teamsters v. United States,* 431 U.S. 324 (1977). All of this work is rendered meaningless if Title VII plaintiffs who have made statistical showings meeting the standards of this Court can be defeated on the basis of unfounded speculation as to campaigns to increase the proportion of applications filed by blacks, presumptions of past discrimination *against whites,* and the like. *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 621 (1974), held that "supposition" and "speculative inference" are not enough.

It is also impossible to use statistical evidence to prove discrimination if such evidence can be defeated by the simple expedient of a defense expert's subdivision of the data into ever-smaller units, so as to make it impossible for a test of statistical significance to be able to detect the significance. Many of the courts of appeals have confronted this situation; until entry of the decision below, all had resolved it by requiring the aggregation of data in a meaningful way, to avoid the unfair exoneration of the defendant. *Lilly v. Harris-Teeter Supermarket,* 720 F.2d 326, 336 n.17 (4th Cir. 1983) (aggregation over years), *cert. den.,* 466 U.S. 951 (1984); *Eldredge v. Carpenters 46 Northern California Counties Joint Apprenticeship and Training Committee,* 833 F.2d 1334, 1339 note 7 (9th Cir. 1987) (same), *cert. den.,* 487 U.S. 1210 (1988); *EEOC*

v. American National Bank, 652 F.2d 1176, 1193 n.12, 1194 (4th Cir. 1981) (aggregation across facilities), *cert. den.*, 459 U.S. 923 (1982); *Ezell v. Mobile Housing Board*, 709 F.2d 1376, 1382 (11th Cir. 1983) (aggregation across tests).

If the fair employment laws are to work as Congress intended, it is essential, where racial or sexual discrimination has actually occurred, that there be some way in which a plaintiff can prove the discrimination. The standards adopted by the panel majority allow defendants to escape all accountability by "smoke-filled mirrors", as the dissent originally put it, App. at 163a. Similar techniques are available in all cases. Unless this decision is reviewed, Title VII defendants across the country will try such techniques to defeat liability and bar all remedies for their discrimination.

CONCLUSION

For the reasons stated above, petitioners Daniel Anderson, Jr., *et al.*, request this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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